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10 Attorneys for Defendant
11 INTERNATIONAL BUSINESS
12 MACHINES CORP.

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 DAVID A. KAVITZ,

16 Plaintiff,

17 v.

18 INTERNATIONAL BUSINESS MACHINES
19 CORPORATION, a New York corporation,

20 Defendant.

Case No. CV 08 5591 SBA

**REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF DEFENDANT'S
MOTION TO TRANSFER VENUE**

Date: May 12, 2009
Time: 1:00 p.m.
Courtroom: 3

Complaint Filed: December 16, 2008
Trial Date: None set

21 TO PLAINTIFF AND HIS ATTORNEY OF RECORD:

22 PLEASE TAKE NOTICE that on May 12, 2009 at 1:00 p.m. in Courtroom 3 of the
23 United States District Court – Northern District of California, Oakland Division at 1301 Clay
24 Street, 3rd Floor, Oakland, California, Defendant INTERNATIONAL BUSINESS MACHINES
25 CORPORATION (“IBM”), by and through its attorneys of record, hereby respectfully requests
26 that the Court take judicial notice pursuant to Federal Rule of Evidence Rule 201 of the following
27 document in support of IBM’s Motion to Transfer Venue.


28 1. Plaintiff’s Complaint filed in the United States District Court for the
Northern District of California, Kavitz v. International Business Machines Corporation, Case No.
CV-08-5591-SBA filed on December 16, 2008. Attached hereto as Exhibit “A” is a true and

1 correct copy of said Complaint.

2
3 Dated: April 7, 2009

Respectfully submitted,

JACKSON LEWIS LLP

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6 
7 Mitchell E. Boomer
8 S. Christine Young
9 Attorneys for Defendant
10 INTERNATIONAL BUSINESS
11 MACHINES CORP.
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H:\IBM Corporate Litigation (40134)\Kavitz, David (132264)\Pleadings\Drafts (empty when final)\20090313 Decl. ISO Motion to Transfer Venue (draft).doc

EXHIBIT A

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 Tel: (415) 924-0808
 Fax: (415) 435-9969

4 Attorney for Plaintiff
 5 DAVID A. KAVITZ

FILED

DEC 16 2008

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

6 **UNITED STATES DISTRICT COURT**
 7 **NORTHERN DISTRICT OF CALIFORNIA**

MEJ

8 DAVID A. KAVITZ,

9 Plaintiff,

10 vs.

11 INTERNATIONAL BUSINESS MACHINES
 12 CORPORATION, a New York corpor-
 ation,

13 Defendant.

CV 08 NO: 5591

- COMPLAINT FOR DAMAGES FOR:
1. BREACH OF CONTRACT;
 2. VIOLATION OF COVENANT OF GOOD FAITH AND FAIR DEALING;
 3. BREACH OF FIDUCIARY DUTY;
 4. MONEY HAD AND RECEIVED

JURY TRIAL DEMANDED

16 Plaintiff DAVID A. KAVITZ, through undersigned counsel,
 17 complains and alleges as follows:

18 **PARTIES, JURISDICTION & VENUE**

20 1. Plaintiff DAVID A. KAVITZ ("KAVITZ") is, was, and at
 21 all relevant times has been a resident of Austin, Texas.

22 2. Defendant International Business Machines corporation
 23 ("IBM") is a New York corporation.

24 3. The various aspects giving rise to the subject causes
 25 of action occurred geographically in this district and in New

26 COMPLAINT FOR DAMAGES

1 York, Georgia, Illinois and Texas.

2 4. There is a diversity of citizenship by virtue of
3 KAVITZ being a resident of Austin, Texas and IBM being head-
4 quartered in Armonk, New York.

5 5. The damages claimed herein are in excess of the
6 statutory minimum for Federal jurisdiction.

7 **FACTUAL BACKGROUND**

8
9 6. Until July, 2001 KAVITZ was employed as a sales repre-
10 sentative for Informix Data Base Software, his major account
11 being Motorola.

12 7. In July of 2001 IBM acquired Informix Data Base Soft-
13 ware and KAVITZ became Software Sales Representative for IBM
14 (more specifically identified as OEM Strategic Accounts) and
15 continued to service the Motorola account and bringing in
16 over \$20,000,000.00 in revenue for IBM from the Motorola
17 account alone.

18 8. Effective January 1, 2006 IBM presented KAVITZ with
19 an Incentive Plan Letter (the "CONTRACT") outlining the
20 goals KAVITZ was expected to meet (copy attached as Exhibit
21 A) which included the followig (see Exhibit A, page 3, "Sig-
22 nificant Transactions"):

23 "IBM management reserves the right to review and, at
24 its sole discretion, adjust incentive payments assoc-
25 iated with transactions: (1) which are disproportionate
26 when compared with the territory opportunity or quota

COMPLAINT FOR DAMAGES

size; or (2) for which the incentive payments are disproportionate when compared with the individual's performance contributions toward the transactions."

9. Based upon the work performed by KAVITZ in 2006 IBM recognized an income of \$3,800,000.00 for the Motorola account, primarily all due to the efforts of KAVITZ.

10. Based upon IBM's incentive program KAVITZ was due the sum of \$359,748.02 for the year ending December 31, 2006 per "Commission Statement" (copy attached as Exhibit B - see page 1).

11. Instead, IBM arbitrarily reduced the monies due KAVITZ by approximately two thirds to \$114,961.80, which reduction was made without justification by IBM (page 2 Exhibit B).

FIRST CAUSE OF ACTION

Breach of Contract

12. KAVITZ realleges and incorporates by reference those allegations set forth in Paragraphs 1-11, supra, as though fully set forth herein.

13. In doing the acts alleged above IBM breached the express terms of the CONTRACT with KAVITZ.

14. KAVITZ has performed all of his obligations under the CONTRACT.

COMPLAINT FOR DAMAGES

1 15. As a proximate result of IBM's breach KAVITZ has
2 suffered damages in the amount of \$244,786.22.

3
4 **SECOND CAUSE OF ACTION**

5 **Violation of Good Faith and Fair Dealing**

6 16. KAVITZ realleges and incorporates by reference those
7 allegations set forth in Paragraphs 1-15, supra, as though
8 fully set forth herein.

9 17. IBM has violated the covenant good faith and fair
10 dealing inherent in every contractual relation.

11 18. The CONTRACT was prepared by IBM and required KAVITZ,
12 at the risk of his position, to agree to the terms of the In-
13 centive Program.

14 19. Based upon his long term relation with Motorola and
15 his ongoing position in IBM, KAVITZ, in good faith, fully per-
16 formed pursuant to the terms of the CONTRACT.

17 20. IBM, on the other hand, without notification and
18 without explanation, violated its covenant of good faith and
19 fair dealing with KAVITZ and denying him compensation in the
20 amount of \$244,786.22.

21 **THIRD CAUSE OF ACTION**

22 **Breach of Fiduciary Duty**

23 21. KAVITZ realleges and incorporates by reference those
24 allegations set forth in Paragraphs 1-20, supra, as though
25

26 COMPLAINT FOR DAMAGES

1 fully set forth herein.

2 22. As a result of its CONTRACT IBM owed a fiduciary
3 duty of candor and trust to KAVITZ and breached its fiduciary
4 duty by doing the acts set forth hereinabove.

5 23. As a proximate result of IBM's breach, KAVITZ has
6 suffered damages in the amount of \$244,786.22.

7 24. In doing the acts alleged herein an assessment of
8 punitive damages against IBM is warranted in an amount ap-
9 propriate to punish IBM and deter it from engaging in similar
10 misconduct.

11 **FOURTH CAUSE OF ACTION**

12 **Money Had and Received**

13
14 25. KAVITZ realleges and incorporates by reference those
15 allegations set forth in Paragraphs 1-24, supra, as though
16 fully set forth herein.

17 26. As a result of IBM's acts as alleged above, IBM has
18 received monies totalling \$244,786.22 to which KAVITZ is right-
19 fully entitled, thereby keeping said funds for itself.

20 WHEREFORE, David A. Kavitz prays for the following relief:

21 **On the First Cause of Action**

- 22 A. Damages in the amount of \$244,786.22.
23 B. Interest at the legal rate from January 1, 2007.
24 C. Attorney fees and costs.
25

26 COMPLAINT FOR DAMAGES

1 On the Second Cause of Action

- 2 A. Damages in the amount of \$244,786.22.
3 B. Interest at the legal rate from January 1, 2007.
4 C. Attorney fees and costs.

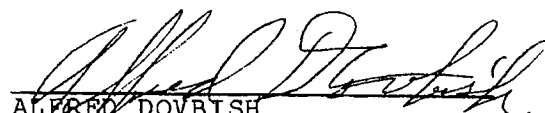
5 On the Third Cause of Action

- 6 A. Damages in the amount of \$244,786.22.
7 B. Interest at the legal rate from January 1, 2007.
8 C. Punitive damages.
9 D. Attorney fees and costs.

10 On the Fourth Cause of Action

- 11 A. Damages in the amount of \$244,786.22,
12 B. Interest at the legal rate from January 1, 2007.
13 C. Punitive damages.
14

15
16 Dated: 12-16-08

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20 ALFRED DOVBISH
Attorney for DAVID A. KAVITZ
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COMPLAINT FOR DAMAGES

EXHIBIT A



W3 Home

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IBM Confidential

Letter dates/status:

Accepted date: 30/01/2006
 Status: Accepted
 HR status: HR approved

Employee details:

Incentive plan year: 2006
 Name: David A. Kavitz
 Name in local language: David A. Kavitz
 Serial number: 5A8152
 Country: 897 - UNITED STATES
 Organization: SSW - Software Group
 Business unit: WCH - SW/Channels/Sales
 Department: NVXA
 First plan date of current year: 01/01/2006
 Manager of eligible employee - Name: Andre Temidis
 Manager of eligible employee - Serial: 5A8785
 Manager of eligible employee - Cty: 897 - UNITED STATES
 Manager of eligible employee - Hugh
 Second level: Flannery/Edison/IBM@IBMUS
 Rep BP Info
 Mgmt Strategic
 Partner
 Eligible
 employee
 TERR -
 TERRITORY
 6 - Solution
 Provider / Core
 BP

Plan details:

Plan start date: 01/01/2006 Plan end date: 31/12/2006
 Plan type/name: SW291 - 55/45 - 55/20/25
 Plan calc type: % of TI
 Plan length: Annual
 Base pay %: 54.67 Target incentive %: 45.33
 OTE %: 150.00 Full year/assigned: F

EXHIBIT A 1054

Incentive element details:**PRI**

Revenue

| | | | |
|---------------------------|------------------|------------------------------------|---|
| Weight: | 55.00 % of TI | Ind/ Small team/ Large team: | I |
| Main / overlay: | P | Currency Ind: | P |
| Measurable via system: | | | |

| | |
|--------------|--------------|
| Total quota: | 1,725,806.00 |
|--------------|--------------|

| | |
|------------------|---------|
| Unit of measure: | Revenue |
|------------------|---------|

| | |
|--------------------------------------|--|
| Territory description in English: | Information Management OEM Named Accounts |
|--------------------------------------|--|

SEC

Revenue

| | | | |
|---------------------------|------------------|------------------------------------|---|
| Weight: | 20.00 % of TI | Ind/ Small team/ Large team: | I |
| Main / overlay: | P | Currency Ind: | P |
| Measurable via system: | | | |

| | |
|--------------|--------------|
| Total quota: | 1,137,647.00 |
|--------------|--------------|

| | |
|------------------|---------|
| Unit of measure: | Revenue |
|------------------|---------|

| | |
|--------------------------------------|--|
| Territory description in English: | Information Management OEM Named Accounts |
|--------------------------------------|--|

6TH

Challenges

| | |
|---------|------------------|
| Weight: | 25.00 % of TI |
|---------|------------------|

OTHER IMPORTANT INFORMATION**Right to Modify or Cancel:**

This document states IBM's policies and procedures as they exist

EXHIBIT A 2054

at the time of publication. The Incentive Plan is described in detail on the internal Incentive Plan Website (the "Plan"), and you should rely on the information provided on the Website for complete and up-to-date information. The Plan does not constitute an express or implied contract or a promise by IBM to make any distributions under it. IBM reserves the right to adjust the Plan terms, including but not limited to any quotas and target incentives, or to cancel the Plan, for any individual or group of individuals, at any time during the Plan period up until any related incentive payments have been earned under its terms. Because of the need for confidentiality, decisions regarding changes to IBM's programs, practices, or policies are generally not discussed or evaluated below the highest levels of management. Managers and their representatives below such levels do not know whether IBM will or will not change or adopt any particular compensation plan; nor are they in a position to advise any employee on, or speculate about, future plans. Employees should make no assumptions about the impact potential Plan changes may have on their personal situations unless and until any such changes are formally announced by IBM.

Advances:

Periodic distributions you may receive under the Plan are advances paid to you prior to your earning of the incentive. Because Incentive Plan quotas or similar sales objectives for annual plans are designed based on full year performance results, 2006 incentives are earned on January 31, 2007, provided the following conditions have been met: (1) you have complied with the Incentive Plan; (2) you have not engaged in any fraud or misrepresentation relating to any of your sales transactions or incentives; and (3) the customer has paid the invoice for the sales transaction related to your incentive. If any of the foregoing conditions have not been met, then the incentive is not earned. Deductions for overpayments may be made from advances paid to you up until the date those advances become earned incentives.

Progress Reports:

Any progress reports regarding Plan achievement that may be distributed to employees during the year are provided for informational purposes only, and do not constitute a promise by IBM to make any specific distributions to any employee.

Salary:

Any incentive opportunity communicated to you which includes some aspect of salary in the calculation reflects the salary in effect on the date such communication was prepared. Actual earnings opportunities will take into account any salary adjustments that may be made during the year.

Significant Transactions:

IBM Management reserves the right to review and, in its sole discretion, adjust incentive payments associated with transactions: (1) which are disproportionate when compared with the territory opportunity or quota size; or (2) for which the incentive payments are disproportionate when compared with the individual's performance contribution towards the transactions.

EXHIBIT A 3054

Payment Thresholds:

For Plans with minimum periodic thresholds for specific incentive elements, those minimum targets must be met for the related periodic incentive payment to be released. Target Incentive earnings opportunities assume achievement of all applicable minimum periodic thresholds. For specific threshold criteria, if any, that apply to your incentive Plan, view your full Plan details using the link to the Incentive Plan Website provided above.

Applicability:

In the event any provision of this Disclaimer is held to be invalid or unenforceable, the remaining provisions of this Disclaimer remain in full force and effect.

END OF DISCLAIMER

Manager Comments:

FMS build 5.5 (5.5.1.1)

~~EXHIBIT~~ A 4 of 4

EXHIBIT B

W3 Field Management System

COMMISSION STATEMENT

IBM.

IBM Confidential

Name: David A. Kavitz **Serial:** 5A8152 **Cty:** 897
Plan type: SW291 **Plan start:** 01/01/2006 **Plan end:** 31/12/2006
Organization: Software Group **Dept:** NVXA **Business unit:** WCH
On target earnings: USD209,406.60 **FY ref salary:** USD139,604.40 **YTD ref salary:** USD127,970.70
On target earnings %: 150.00 **TI \$:** USD94,930.29 **TI %:** 45.33
Base pay %: 54.67 **Plan calc type:** % TI Plan

Amount sent to payroll: **USD114,961.80** Statement status: FINAL
 Commission month: **11 Seq 1** Statement no: **1149140**

- Summary payment
- Quota based commissions
- Payout table
- Commission salary
- Local challenges
- Advances
- Guarantees
- Commission summary
- Manual payment
- Claims

Summary payment

YTD effective commission: **USD359,748.02**

(YTD minimum due employee, if applicable, or YTD commission due, whichever is greater)

YTD effective commission: USD359,748.02
YTD commission due: **USD359,748.02**

YTD due employee: **USD359,748.02**

(Less -)

Previous automated payments USD26,555.94

EXHIBIT

B 1 of 6

sent to payroll:

| | | |
|--------------------------------|---------------------|--|
| Amount previously paid: | USD26,555.94 | |
|--------------------------------|---------------------|--|

(Equals =)

| | | |
|-----------------------------|----------------------|--|
| Amount due employee: | USD333,192.08 | |
|-----------------------------|----------------------|--|

| | | |
|--------------------------------|----------------------|--|
| Amount sent to payroll: | USD114,961.80 | |
|--------------------------------|----------------------|--|

Payment override in the amount of USD114,961.80 applies this month; therefore amount sent to payroll differs from amount due employee.

Amount previously paid: USD26,555.94
(Plus +) Amount sent to payroll: USD114,961.80

| | | |
|------------------------------|----------------------|--|
| Closing balance paid: | USD141,517.74 | |
|------------------------------|----------------------|--|

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Quota based commissions

View comments on your performance for a listed group incentive element by clicking

Assessment reason.

| Incentive element | | | | |
|-------------------|---------------------------|-----------------|-----------------------|-----------------|
| PRI | Incentive element weight: | 55.00 % of TI | | |
| | Description: | Revenue | Commission salary: | USD139,604.40 |
| | Achievement: | USD4,081,429.00 | Payout (seq): | SWGNUMGR(6) |
| | YTD quota: | USD1,581,988.83 | FY quota: | USD1,725,806.00 |
| | YTD ach %: | 257.99 | FY ach %: | 236.49 |
| | Attain %: | 650.98 | Commission earned: | USD339,885.39 |
| | Protected attain %: | 20.00 | Protected commission: | USD10,442.33 |
| | FY TI\$ at OTE: | USD52,211.66 | Comm on FY TI\$ (%): | 650.98 |

| Incentive element | | | | |
|-------------------|--|--|--|--|
|-------------------|--|--|--|--|

EXHIBIT B 2056

SEC Incentive 20.00 % of TI
 element weight:
 Description: Revenue Commission USD139,604.40
 salary:
 Achievement: USD951,263.00 Payout (seq): SWGNMGR(4)
 YTD quota: USD1,042,843.08 FY quota: USD1,137,647.00
 YTD ach %: 91.22 FY ach %: 83.62
 Attain %: 83.62 Commission USD15,875.57
 earned:
 Protected attain 20.00 Protected USD3,797.21
 %: commission:
 FY TI\$ at OTE: USD18,986.06 Comm on FY 83.62
 TI\$ (%):

YTD quota based commission amount: USD355,760.96

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Payout table

(current contents of tables used in "Quota Based" calculations including accumulation where applicable)

| Payout table | Description | Seq | Min % achievement needed | Min FY / YTD indicator | Max % achievement needed | Max FY / YTD indicator | FY subtr % |
|------------------------------|-------------|-----|--------------------------|------------------------|--------------------------|------------------------|------------|
| SWGNMGR MISS THRESHOLD 18.4% | | 1 | 0.00 | F | 18.40 | F | 0 |
| SWGNMGR THRESHOLD YTD 18.4% | | 2 | 18.40 | F | 18.40 | F | 0 |
| SWGNMGR PASS YTD THRES 18.4% | | 3 | 18.40 | F | 20.00 | F | 0 |
| SWGNMGR PASS FY THRES 20% | | 4 | 20.00 | F | 100.00 | F | 0 |
| SWGNMGR ACCEL3X + 20% ETI | | 5 | 100.00 | F | 115.00 | F | 100 |
| SWGNMGR ACCELERATOR 4X @115% | | 6 | 115.00 | F | 10,000.00 | F | 115 |

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Commission salary

| Effective date | Reference salary | Location |
|----------------|------------------|----------|
| 01/01/2006 | USD11,633.70 | |

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Local challenges

Total of challenges from previous months: USD3,987.06

| Order no. | Order % | Achievement % | Category | Status | Commission salary | Commission % | Description | Amount |
|-----------|---------|---------------|----------|--------|-------------------|--------------|-------------|--------|
|-----------|---------|---------------|----------|--------|-------------------|--------------|-------------|--------|

N/A

YTD challenge amount: USD3,987.06

[Back to top](#)**Claims**

Total of claims from previous months: USD0.00

Total of protected claims from previous months: USD0.00

View a listed manual monetary claim by clicking the **claim number**.

Values for Amount % indicator column are A-commission amount, P-achievement percent, C-% of plan, S-% of YTD reference salary

| Claim no. | Claim type | Incentive element | Percentage | Amount \$ | Amount % indicator | Protected claim amount \$ | Description |
|-----------|------------|-------------------|------------|-----------|--------------------|---------------------------|-------------|
|-----------|------------|-------------------|------------|-----------|--------------------|---------------------------|-------------|

N/A

YTD claim amount: USD0.00

YTD protected claim amount: USD0.00

[Back to top](#)**Advances**

Total of advances from previous months: USD0.00

Total of protected advances from previous months: USD0.00

View a listed advance by clicking the claim number.

Values for Amount % indicator column are A-commission amount, P-achievement percent, C-% of plan, S-% of YTD reference salary

| Claim no. | Percentage | Amount \$ | Amount % indicator | Protected advance amount \$ | Description |
|-----------|------------|-----------|--------------------|-----------------------------|-------------|
|-----------|------------|-----------|--------------------|-----------------------------|-------------|

| | | | | | |
|--------|------|---------------|---|---------|---------------------------|
| 435200 | 0.00 | USD114,961.80 | A | USD0.00 | pymt override per manager |
|--------|------|---------------|---|---------|---------------------------|

YTD advances: USD114,961.80

YTD protected advances: USD0.00

[Back to top](#)**Guarantees**

Total of guarantees from previous months: USD0.00

EXHIBIT

B 4056

View a listed guarantee by clicking the **claim number**.

Values for Amount % indicator column are A-commission amount, P-achievement percent, C-% of plan, S-% of YTD reference salary

| Claim no. | Percentage | Amount \$ | Amount % indicator | Description |
|-----------|------------|-----------|--------------------|-------------|
|-----------|------------|-----------|--------------------|-------------|

N/A

YTD guarantees: USD0.00

YTD commission withheld during USD0.00

guarantee period:

YTD protected guarantees: USD0.00

YTD protected guarantees = YTD guarantees less minimum of

- YTD guarantees
- YTD commission withheld during guarantee period

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Commission summary

| | YTD quota based commission | YTD claims | YTD local challenges | Total | Effective commission |
|---|----------------------------|------------|----------------------|---------------|----------------------|
| PRI Total | USD339,885.39 | USD0.00 | N/A | USD339,885.39 | USD339,885.39 |
| Protected | USD10,442.33 | USD0.00 | N/A | USD10,442.33 | |
| SEC Total | USD15,875.57 | USD0.00 | N/A | USD15,875.57 | USD15,875.57 |
| Protected | USD3,797.21 | USD0.00 | N/A | USD3,797.21 | |
| 6TH Total | N/A | USD0.00 | USD3,987.06 | USD3,987.06 | USD3,987.06 |
| YTD effective commission: USD359,748.02 | | | | | |

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Manual payments

Total of manual payments from previous months: USD0.00

Total of protected manual payments from previous months: USD0.00

View a listed manual payment or check by clicking the **claim number**.

Values for Amount % indicator column are A-commission amount, P-achievement percent, C-% of plan, S-% of YTD reference salary

| Claim no. | Percentage | Amount \$ | Amount % indicator | Protected manual payment amount \$ | Description |
|-----------|------------|-----------|--------------------|------------------------------------|-------------|
|-----------|------------|-----------|--------------------|------------------------------------|-------------|

N/A

YTD manual payment amount: USD0.00

EXHIBIT B 5 of 6

YTD protected manual USD0.00
payment amount:

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Go to next statement

**Audit
trail**

FMS build 5.5 (5.5.1.1)

EXHIBIT B 8 of 6